

TATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

TOWN OF MAYFIELD,

Petitioner,

To Review Under Section 101 of the New York Labor
Law: Labor Law a Determination made under Article 2
of the Labor Law, dated September 15, 2016,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PES 16-016

RESOLUTION OF DECISION

APPEARANCES

Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C., Albany, (*James A. Resila* of counsel),
for petitioner.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Benjamin T. Garry*, of
counsel), for respondent.

WITNESSES

Melvin H. Dopp and Michael John Stewart for petitioner.

Richard Argotsinger, Carl Avery, Glenn Frasier, James Blowers, Scott Hallenback, Clifford
Marcellus, Michael John Stewart, and Michael Cappelli for respondent.

WHEREAS:

On November 14, 2016, petitioner Town of Mayfield (hereinafter "Town") filed a petition
with the Industrial Board of Appeals (hereinafter "Board") pursuant to Labor Law § 101 seeking
review of a determination under Article 2 of the Labor Law issued by respondent Commissioner
of Labor (hereinafter "Commissioner" or "DOL") on September 15, 2016. The Commissioner filed
an answer on December 22, 2016.

Upon notice to the parties, a hearing was held before Michael A. Arcuri, Esq., Board
member and designated hearing officer in this matter, on September 13, 2017, October 11, 2017,
and November 8, 2017. Each party was afforded a full opportunity to present documentary
evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and
to file post-hearing legal briefs.

The determination under review found that the Town “behaved in a retaliatory manner” against Clifford Marcellus (hereinafter “Marcellus”), a former employee of the Town, because he engaged in activities protected by the Public Employee Safety and Health Act (hereinafter “PESHA”) in violation of Labor Law § 27-a (10).

The petition alleges that the DOL’s determination was unreasonable because Marcellus’s workplace violence complaint was facially invalid and went unfounded; there was a workplace violence complaint filed against Marcellus by his supervisor, which was also unfounded; Marcellus was laid off for lack of work; the DOL’s investigation was flawed; and, the DOL’s determination was not supported by substantial evidence.

Based on the record evidence, we find that petitioner did not meet its burden of proof to establish that the Commissioner’s determination that the Town retaliated against Marcellus in violation of Labor Law § 27-a (10) was unreasonable because there was sufficient evidence that the Town retaliated against Marcellus by laying him off less than one week after he filed a workplace violence complaint against his supervisor and one week after he complained to his supervisor about unsafe working conditions.

SUMMARY OF EVIDENCE

On or about June 23, 2011, Marcellus filed a complaint with the DOL’s Public Employee Safety and Health Bureau (hereinafter “PESH”) stating that he was laid off by the Town in retaliation for filing a workplace violence complaint with the Town regarding an incident that occurred between Marcellus and his supervisor, Melvin Dopp (hereinafter “Dopp”). After investigation, PESH determined that the Town did discriminate against Marcellus by laying him off after he engaged in PESHA protected activity and in violation of Labor Law § 27-a (10).

Petitioner’s Evidence

Melvin H. Dopp’s Testimony

Dopp has been the Highway Superintendent for the Town since about 2006. He supervises about nine staff members and he and his staff are responsible for maintaining the roads, operating a garbage truck, mowing grass, plowing roads, digging ditches, replacing culverts, staffing emergency actions, and working with the fire department. Dopp hired Marcellus to work on the garbage truck and after about a year, in 2008 or 2009, Dopp hired Marcellus to work with the highway department, which gave Marcellus better benefits, including union membership and more hours. Despite Marcellus having some problems with his temper when he worked on the garbage truck, Dopp thought he was a good worker and so he hired Marcellus to work in the highway department.

After a 60-day probation period at the beginning of his highway department job, Marcellus became a union member. After the probation period ended, Dopp testified that Marcellus began to have problems with his temper. Dopp spoke to him about these problems and wrote him up for some of them but told Marcellus that he wanted to put those incidences aside and move forward, so he ripped up the write-ups.

On the morning of June 10, 2011, Dopp gave employees their assignments and went back to the office. He heard yelling, went outside and found Marcellus yelling about being assigned to mow the cemetery and that he could not put the mower on the truck himself. Another employee, Jeff Fairbanks, offered to help and lifted the mower onto Marcellus's truck for him. Dopp told Marcellus that he had to stop yelling and that he would go to the cemetery to unload the mower for Marcellus. When they arrived at the cemetery, Marcellus continued to yell at Dopp. Dopp told him to stop yelling, asked Marcellus where he wanted him to put the mower, and then put it down in the cemetery. Dopp then told Marcellus that Marcellus needed to do his job and Dopp left the cemetery. Dopp testified that he did not become enraged or threaten to throw the mower at Marcellus nor could he have thrown it at Marcellus because he was ten or twelve feet away from Marcellus. Dopp testified that an employee was supposed to just lift a mower on and off a truck, or if that employee needed help, the employee should ask for help or tell Dopp that he needed help.

Dopp wrote up the incident that happened on June 10, 2011 and gave that write-up to Marcellus on June 13, 2011. Dopp also filled out two workplace violence incident reports about what happened on June 10, 2011 and gave those to Michael Stewart (hereinafter "Stewart"), the workplace violence contact person for the Town, on June 13, 2011. The two workplace violence incident reports are in two different handwritings and only one is signed by Dopp with the date June 13, 2011. The forms both state that Marcellus was yelling and swearing. The unsigned form also states that Marcellus "tried to start a[n] altercation down at Riceville Rd w/ me." Dopp did not give the workplace violence incident reports to Marcellus. Dopp did not explain why he filed two separate workplace violence incident reports. Dopp did not know that Marcellus filed a workplace violence incident report against him until about a year later.

On June 16, 2011, Dopp attended the Town's monthly board meeting and informed the Town's board that he wanted to terminate Marcellus's employment. Dopp had exclusive authority to hire and fire and the board could not interfere with his decision to terminate Marcellus. On June 17, 2011, Dopp gave Marcellus a notice informing him that he was being laid off as of 7:00 a.m. on June 20, 2011. Dopp testified that at the time that he laid off Marcellus, he did not know that Marcellus had filed a workplace incident report against him. Dopp did not give Marcellus a reason for why he was being laid off at the time that Dopp terminated him. Dopp testified that he is responsible for the highway department's budget and if they go over budget, the money comes out of Dopp's pay. Dopp testified that money had never been taken out of his pay because of going overbudget, but it could happen. During the week of June 13, 2011, Dopp determined that he needed to lay off Marcellus, the least senior employee in the department, because his department had mechanical breakdowns that were costing money and Marcellus was a "troubled employee." Dopp further testified that the June 10, 2011 incident between Dopp and Marcellus that occurred at the cemetery did factor into Dopp's decision to terminate Marcellus's employment. Dopp did not have documentation showing that the cost of mechanical breakdowns required him to have to lay off an employee. Dopp testified with respect to the work of the highway department, "... there is usually always something to do, as long as there is money to do it."

Dopp had never laid off an employee prior to Marcellus. Dopp did not try to hire Marcellus back because within about a week after he laid Marcellus off, Marcellus followed Dopp around while taking pictures of Dopp, tried to start fights with Dopp, and tried to have Dopp arrested.

Michael Stewart's Testimony

Stewart is a Code Enforcement Officer for the Town and he has worked in that position since at least 1999. At some point during his tenure, possibly in 2010 or 2011, Stewart became the workplace violence contact person for the Town. The first workplace violence incident that Stewart investigated in this role was the incident between Marcellus and Dopp that occurred on June 10, 2011. Stewart received two incident reports from Dopp on June 13, 2011 that were about Marcellus's behavior on June 10, 2011 and he spoke with Dopp to listen to Dopp's description of what happened. Stewart received a workplace violence incident report from Marcellus on June 14, 2011. Stewart also spoke to Marcellus about the incident report that he received from Marcellus and he did not tell Marcellus that Dopp filled out workplace violence incident reports about Marcellus. Stewart testified that he also did not tell Dopp about the workplace violence incident report that Marcellus filed against Dopp. Stewart did tell Richard Argotsinger (hereinafter "Argotsinger") about Dopp's and Marcellus's workplace violence incident reports because Argotsinger was Stewart's supervisor and it was the first workplace violence incident that had been reported to him in his role as the Town's person handling workplace violence matters. Stewart testified that he believes he would have told Argotsinger about the reports on the days that he received them if Argotsinger was in the office those days. Stewart maintained logs of who called him, who left him messages and who he spoke to in person, along with other daily tasks. While Stewart could not recall the substance of some of these log entries, Stewart's log reflected that he had contact with Dopp and Marcellus on June 13, 2011. The log notes that the contact with Marcellus on that date was regarding workplace violence. The log reflects additional contact with Dopp, Marcellus, and Argotsinger on June 14, 2011 regarding workplace violence, Stewart also had contact with Dopp on June 16, 2011 though the log indicates the subject was something other than workplace violence. Finally, the log for June 20, 2011 indicates that Stewart had contact with Dopp regarding a workplace violence interview and contact with Argotsinger regarding workplace violence.

Stewart sent a letter dated June 22, 2011 to Argotsinger saying he determined that no further action was required on any of the incident reports filed by Dopp and Marcellus but that during the annual review for Dopp and Marcellus, the incident should be discussed, as well as what does and what does not constitute workplace violence. Stewart testified that he did not think he knew that Marcellus had already been laid off when he issued his determination on the workplace violence incident reports on June 22, 2011. Stewart also testified that he attends almost all of the Town Board meetings though he could not specifically recall if he attended the June 16, 2011 meeting. Stewart will also sometimes be present for the executive session of Town Board meetings.

Stewart testified that he did not think that what happened rose to the level of workplace violence as it was just two people who were annoyed. Stewart did not consult with anyone from the Department of Labor or who had otherwise trained him on how to deal with workplace violence issues. He reviewed some of his training materials and made the determination.

Respondent's Evidence***Richard Argotsinger's Testimony***

Argotsinger is the Town Supervisor. He was elected to that position in 2009. Argotsinger was present at the June 16, 2011 Town board meeting when Dopp informed the Town's board of his intention to terminate Marcellus's employment. Dopp requested that the board move into executive session so that only Argotsinger, Dopp, the Town's attorney, and the four councilmembers for the Town were present when Dopp informed them of his intention to terminate Marcellus. Argotsinger was surprised that Dopp wanted to terminate Marcellus because he understood Marcellus to be a hard worker. Argotsinger testified that the Town's board advised Dopp not to terminate Marcellus because of the one incident at the cemetery. Argotsinger testified that there was no discussion regarding the finances of the highway department and its need to reduce personnel. The Town's board does not decide who the highway department can hire or fire but it does appropriate money for the highway department's budget. Argotsinger learned that Dopp had in fact laid Marcellus off when Marcellus told him on June 17, 2011. On that same date or on June 20, 2011, Stewart told Argotsinger that both Dopp and Marcellus filed workplace violence incident reports against each other regarding the June 10, 2011 incident at the cemetery. Argotsinger could not recall certain dates or details regarding the events between June 10, 2011 and June 17, 2011 nor could he recall the substance of conversations that he had with Marcellus, Dopp or Stewart regarding the workplace violence incident and the reports that were filed, but Argotsinger recalled with certainty that he did not learn that Marcellus filed a workplace violence incident report against Dopp until after Marcellus was laid off by Dopp.

Carl Avery's Testimony

Carl Avery (hereinafter "Avery") is employed by the Town and he works for the highway department. He has worked for the highway department since 2005. He did not personally witness the June 10, 2011 incident between Marcellus or Dopp.

Glenn Frasier's Testimony

Glenn Frasier (hereinafter "Frasier") was employed by the Town in June 2011 as an equipment operator. He retired in October 2014. He did not personally witness the June 10, 2011 incident between Marcellus or Dopp. Frasier testified that usually two people were assigned to cemetery duty and they would work together to lift the mowers out of and onto the truck.

Frasier did not believe that there was a lack of work for highway department employees in June 2011 when Marcellus was laid off. In January 2012, more than six months after Marcellus was laid off, the highway department had to hire additional personnel to do snow plowing, which was a task that Marcellus performed when he was a highway department employee.

James Blowers's Testimony

James Blowers (hereinafter "Blowers") was employed by the Town's highway department from 1982 until 2016. In 2011, Blowers was the deputy superintendent. He was responsible for making sure jobs assigned by Dopp were completed by the highway department employees. Blowers was not present on June 10, 2011, the date of the incident at the cemetery between Dopp

and Marcellus. Blowers was also not present on June 17, 2010, at the time that Marcellus was informed that he was being laid off. Blowers learned that Marcellus no longer worked for the Town on June 20, 2011. Blowers understood that Marcellus was fired and did not learn that he was laid off until months later. Blowers was disappointed that Dopp did not tell him that he was planning to lay off Marcellus nor did Dopp ever tell Blowers why Marcellus was laid off. Blowers testified that the highway department usually had six employees and there was sufficient work for six employees in June 2011 because it was the busiest time of the year.

Jeffrey Fairbanks's Testimony

Jeffrey Fairbanks (hereinafter "Fairbanks") was employed by the Town's highway department for 20 years. He left in April 2017. On the same June 2011 date as the incident at the cemetery between Dopp and Marcellus, Fairbanks helped Marcellus put a push mower in the truck to go to the cemetery. He does not recall if Marcellus asked him to help but he testified that it is courtesy to help one another at work. Fairbanks testified that it is easier if two people lift the mower.

Scott Hallenbeck's Testimony

Scott Hallenbeck (hereinafter "Hallenbeck") was employed by the Town's highway department in June 2011. He worked there for more than 25 years and he retired in 2015. In June 2011, Hallenbeck was the shop steward for the highway department's union. Hallenbeck testified that Marcellus told him about the incident with Dopp in June 2011 and that, on a subsequent day, Hallenbeck went with Marcellus to Stewart's office to get a workplace violence incident report form. He did not know if Marcellus ever filed that report form. Hallenbeck testified that he was called into Dopp's office with Marcellus when Dopp told Marcellus that he was being laid off. Hallenbeck did not recall specifically when this happened but he believed it was about a week after the incident between Dopp and Marcellus at the cemetery. Hallenbeck said that Dopp did not say very much, just that Marcellus was being laid off because his services were not needed at that time. Hallenbeck did not file a grievance regarding Marcellus's lay-off.

Clifford Marcellus's Testimony

Marcellus began working for the Town's highway department in late 2007 or early 2008. He began by working part-time for the Town on the garbage truck and after about 1½ years, Dopp asked Marcellus to become a full-time truck driver/laborer with the highway department. Dopp supervised Marcellus as a part-time garbage truck worker so he was familiar with his work when he asked Marcellus to become a full-time employee. As a truck driver/laborer, Marcellus drove a plow truck, serviced the garbage truck, the plow truck and other vehicles, mowed along the side of highways and in the cemeteries, and dug culverts.

On May 11, 2011, the highway department employees received a three or four hour training from Dopp about safety at work. One of the matters discussed during that training was about how to lift things so that no one gets hurt, including having two people work together to lift things.

On June 10, 2011, Marcellus had been assigned to go to the cemetery by himself to mow the grass. Previously, he had always been assigned to mow the cemeteries with someone else so that they could work together to get the mowers in and out of the truck. No one told Marcellus

why he was assigned to mow the cemeteries by himself. Marcellus was upset because they had recently been trained about safety and that training discussed that two people should pick up mowers and they always assigned two people to mow the cemeteries, yet he was being assigned to mow the cemetery alone.

Fairbanks helped Marcellus load the mowers onto the truck after Marcellus asked him for help. Marcellus asked who would help him unload the mowers at the cemetery and Dopp said that he would meet him there and help him unload the mowers. At the cemetery, Dopp came up to Marcellus's truck and lifted a mower over his head with two hands and yelled that it was 100 pounds and no big deal. Marcellus said that he did not know if Dopp would hit him with the mower, put it on the ground or put it back on the truck before Dopp put the mower on the ground. Marcellus testified that he told Dopp, "have a nice day, I'm not Hercules." Marcellus then put his headphones on and started mowing.

Marcellus proceeded to mow for about 1½ hours until he needed to leave to take his dog to the vet. He backed the truck into a bank at the cemetery so that he could get the mower back into the truck and he drove back to the highway department. Marcellus left the mower in the back of the truck and left work for the day. He stopped by Argotsinger's office on his way to the vet to tell him about the incident with Dopp at the cemetery because Marcellus felt like Dopp used threatening behavior with him. Argotsinger told Marcellus to file a grievance with the union and to return to his office on Monday at 9:30 a.m. with Hallenbeck.

On Monday morning, June 13, 2011, Dopp called Marcellus and Hallenbeck into his office and Dopp gave him a piece of paper that included a write-up of Marcellus for having a "tantrum" on June 10, 2011. Marcellus did not read the write-up because Hallenbeck took it away from him before he was able to read it and gave it back to Dopp. Hallenbeck told Dopp that Marcellus would not be signing it at that time.

After learning that Dopp wrote Marcellus up, Marcellus spoke to Argotsinger, who told Marcellus to get a workplace violence incident report from Stewart to file against Dopp. Marcellus completed the workplace violence incident report form during his lunch break on June 13, 2011 and he then called his wife to ask her to bring the completed report form to Argotsinger because Stewart had already left the office for the day. The form has the initials "MJS" with the date June 14, 2011 and "rec'd" in a top corner. Marcellus's next meeting related to his employment was on June 17, 2011 when Dopp called Marcellus and Hallenbeck into his office and told Marcellus that his services were no longer needed. Marcellus did not tell Dopp about the workplace violence incident report form that he filled out against Dopp. Marcellus never heard from Stewart about the workplace violence complaint that he filed against Dopp. Marcellus's lay off was never grieved.

Marcellus testified that he did use vulgar or crude language at work once in a while. Marcellus also testified that he did not get upset about job assignments but did get upset about the job assignment on June 10, 2011 because he wanted someone to help him lift the mowers.

Michael Cappelli's Testimony

Michael Cappelli (hereinafter "Cappelli") is a Senior Safety and Health Inspector who works as a consultant for the New York State Department of Labor. During the investigation for this case, Cappelli was a Compliance Safety and Health Office for Public Employee Safety and

Health with the Department of Labor. In that role, he primarily handled enforcement but at times he would investigate discrimination cases, as he did for this case.

Cappelli first learned of Marcellus's complaint when it was assigned to him in August 2011. He reviewed the complaint form and supporting documentation that Marcellus gave to DOL. He also reviewed the Whistleblower Application case summary that a different investigator had completed, which is a form that is filled out by a DOL investigator in a computer database. Cappelli also reviewed a PESH discrimination questionnaire that the DOL investigator who previously worked on the case filled out. That questionnaire references an attached list of witnesses, with names and addresses, which was not actually attached to the questionnaire that was offered into evidence. The questionnaire also references a union grievance, which was also not attached to the questionnaire that was offered into evidence. Cappelli testified that the list of witnesses was in his investigative file but that he did not believe the grievances were in the file. Those documents were never provided to petitioner or the Board during or after the hearing concluded.

Cappelli interviewed Marcellus in person on January 17, 2013 and he also did a site visit to the Town's highway department on January 18, 2013. Cappelli did not recall very much about his site visit. On January 22, 2013, Cappelli completed a document to determine if the elements of discrimination under PESHA were present. Cappelli completed a final report of the investigation sometime in January 2013, which was sent to DOL's counsel's office so counsel's office could issue a determination on Marcellus's complaint.

STANDARD OF REVIEW

The Labor Law provides that an order of the Commissioner shall be presumed valid (Labor Law § 103 [1]). In this matter, the Board's review is limited to determining whether the Commissioner's determination that petitioner unlawfully discriminated against complainant is valid and reasonable (Labor Law §§ 27-a [6] [c], 101). The hearing before the Board is *de novo* (12 NYCRR § 66.1 [c]). The Town bears the burden of proof (Labor Law § 101; Board Rules of Procedure and Practice (hereinafter "Board Rules") [12 NYCRR] § 65.30; *see also Angello v. National Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). That the record contains some evidence which may give rise to another conclusion is not sufficient for us to unsettle the Commissioner's determination (*Matter of Robert Shapiro*, Docket No. PES 09-001, at p. 7 [May 30, 2012]). Petitioner must prove that the challenged determination is invalid or unreasonable by a preponderance of the evidence (Labor Law § 101 [1]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24 [October 11, 2011]).

Discrimination under PESHA

PESHA requires public-sector employers to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protections to the lives, safety, and health of its employees" and "comply with safety and health standards" promulgated under the statute (Labor Law §§ 27-a [3] [a] [1] and [2]). PESHA further protects an employee's right to file a complaint relating to workplace safety and health and protects employees when exercising that right (Labor Law § 27-a [10] [a]).

Public employees who believe that they have been unlawfully discriminated against in violation of PESHAA may file a complaint with the Commissioner within 30 days of the violation (Labor Law § 27-a [10] [b]). If after investigation “the commissioner determines that the provisions of this subdivision have been violated, [she] shall request the attorney general to bring an action in the supreme court against the person or persons alleged to have violated the provisions of this subdivision” (*id.*). The employer may seek review of that determination before the Board within 60 days of the date of the determination (Labor Law § 27-a [6] [c]). The Board’s role in a case alleging discrimination under the statute is not to determine as a final matter that the public employer violated PESHAA, but to review whether the Commissioner’s determination that the employer violated PESHAA by discriminating against an employee who complained about workplace safety or health was valid and reasonable (Labor Law §§ 27-a [6] [c], 101 [3]; *Matter of Janice Razzano*, Docket No. PES 11-009, at pp. 8-9 [December 14, 2012]).

Unlawful retaliation under Labor Law § 27-a (10), requires evidence that (1) the employee engaged in a protected activity under the statute; (2) the employer was aware of the protected activity; (3) the employee suffered an adverse employment action; and (4) there was a sufficient nexus between the protected activity and the adverse employment action (*see McDonnell Douglas Corp. v Green*, 411 US 792, 802-804 [1973]; *Kwan v Andalex Group, LLC*, 737 F3d 834, 843 [2d Cir 2013]; *Matter of Cory Wright*, Docket No. PES 16-013, at pp. 16-17 [September 11, 2019]; *Matter of Town of Lee*, Docket No. PES 14-014 at 6 [May 3, 2017]). The burden of proving the prima facie elements of retaliation is minimal (*Kwan*, 737 F3d at 845; *Raniola v Bratton*, 243 F3d 610, 624-625 [2d Cir 2001]; *Matter of Town of Lee*, Docket No. PES 14-014, at p. 6). Upon meeting that minimal burden, the burden shifts to the employer to rebut the presumption of retaliation by coming forth with evidence showing a legitimate, non-retaliatory reason for the adverse employment action (*Kwan*, 737 F3d at 845; *Matter of Town of Lee*, Docket No. PES 14-014, at p. 6). The employer must show that there was a legitimate, non-retaliatory reason for the adverse action with “admissible evidence” and the explanation must be legally sufficient to justify a judgment for the employer (*Tex. Dept. of Cmty. Affairs v Burdine*, 450 US 248, 254 [1981]). If the employer does so, the burden shifts again, the presumption of retaliation no longer exists and the employee must put forth evidence that the employer’s “proffered, non-retaliatory reason is a mere pretext for retaliation” (*Kwan*, 737 F3d at 845).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of the Board Rules (12 NYCRR) § 65.39.

Petitioner’s statute of limitations argument is waived in this proceeding

Petitioner raises for the first time in its post-hearing brief that CPLR § 214 (2) imposes a three-year statute of limitations on PESHAA retaliation claims brought in court. This basis for appealing respondent’s determination is not plead in the petition, nor did petitioner seek to amend its petition to include this claim during the hearing and, thus, the Board finds that it is waived for purposes of this proceeding (Labor Law § 101 [2]).

Petitioner did not prove that respondent's determination that there was a prima facie case of retaliation was unreasonable or invalid

Because petitioner has the burden of proof, it must, through reliable and credible evidence, show that respondent unreasonably determined that claimant met the "minimal" requirements of a prima facie case of unlawful discrimination under PESH (Kwan, 737 F3d at 844; *Matter of Town of Lee*, Docket No. PES 14-014, at p. 6). Here, the dispute regarding a prima facie retaliation claim is about whether Marcellus's act of filing a workplace violence incident report that, ultimately, was unfounded, constitutes protected activity and about whether the employer had knowledge that Marcellus filed a workplace violence complaint at the time that he was laid off.

A. Marcellus engaged in activity protected by PESH

We find that it was reasonable for respondent to determine that Marcellus's act of filing a workplace violence complaint against his supervisor, Dopp, after they had an altercation during work, constituted protected activity under Labor Law § 27-b. We disagree with petitioner's contention that Marcellus's workplace violence complaint must have been founded to meet the protected activity element of a retaliation claim. PESH encourages employees to report workplace safety violations, including making complaints about workplace violence and shores up that encouragement by prohibiting adverse actions against an employee who does so (Labor Law §§ 27-a [5] [a] and [10] [a]).

Additionally, Marcellus verbally complained to Dopp, his supervisor, that the assignment he was given on June 10, 2011 to mow a cemetery alone was not safe because one person could not safely lift a mower on his own. Marcellus testified that he was particularly concerned about this because such an assignment was typically always given to two people and because his department had received training about safety one month earlier, which included information about two people lifting mowers and other heavy equipment. We find that this verbal complaint that Marcellus made to Dopp only one week prior to being laid off from his employment, also satisfies the protected activity prong of the prima facie retaliation case.

B. The employer had knowledge of Marcellus's protected activities

To satisfy the employer-knowledge element of a prima facie case of retaliation, it is not necessary to prove that the individual decision-maker who took the adverse action had knowledge of the protected activity but simply that the employer had "general corporate knowledge" of the protected activity (Kwan, 737 F3d at 844 citing *Gordon v New York City Bd. of Educ.*, 232 F3d 111, 116 [2d Cir 2000]; *Alston v New York City Transit Auth.*, 14 F Supp 2d 308, 311 [SDNY 1998]).

Respondent's determination that the Town had knowledge of Marcellus's protected activity was reasonable. Marcellus testified that he completed a workplace violence incident report on June 13, 2011 and that his wife brought the report to Argotsinger, the Town Supervisor, on that same day. Petitioner did not refute this testimony because Argotsinger's testimony did not recall sufficient detail to credibly refute Marcellus's testimony. Additionally, Stewart testified that he told Argotsinger about both Dopp's and Marcellus's workplace violence incident complaints, he believes on the same date that he received the complaints and he testified that he received Marcellus's complaint on June 14, 2011. Stewart's logs offer some corroboration of this as they

reflect contact with Argotsinger regarding workplace violence prior to the Town Board meeting when Argotsinger testified he learned of Dopp's intention to lay off Marcellus. Argotsinger testified that he recalled learning about the workplace violence incident complaints on June 17 or June 20, 2011, after Marcellus was terminated. Argotsinger could not recall many facts or dates with any specificity; whereas, both Marcellus and Stewart's testimony as well as Stewart's logs indicate that Argotsinger did know prior to the layoff. There is sufficient evidence in the record to show that the Town had "general corporate knowledge" of the workplace violence incident report that Marcellus filed (*id.*)

We find the respondent's determination that there was sufficient evidence to show that the Town knew of Marcellus's workplace violence incident complaint prior to his being laid off is reasonable (*Matter of Cory Wright*, Docket No. PR 16-013, at p. 19).

C. There was temporal proximity between Marcellus's protected activity and his lay off, satisfying the causation element of a prima facie retaliation case.

There is no dispute that the act of laying off Marcellus on June 17, 2011 was an adverse employment action under PESH (Labor Law § 27-a [10] [a]). The remaining element of the prima facie case is whether there was a causal connection between petitioner's protected activities and that adverse action. Causation may be established indirectly by circumstantial evidence "showing that the protected activity was closely followed in time by the adverse action" (*Kwan*, 737 F3d at 845) (citations omitted).

There is credible evidence in the record that Argotsinger, Stewart, or both knew that Marcellus filed a workplace violence complaint only days prior to being laid off, as Marcellus was laid off on June 17, 2011, less than a week after Argotsinger or Stewart, or both, received Marcellus's workplace violence complaint on June 13, 2011. Dopp informed Argotsinger of his intention to lay off Marcellus on June 16, 2011. Dopp laid Marcellus off on June 17, 2011, exactly one week after Marcellus complained directly to Dopp about workplace safety concerns regarding being assigned alone to mow the cemetery when they had been trained that at least two people should lift mowers.

We find that Marcellus's lay-off, within a week after his workplace safety complaint and less than a week after his workplace violence complaint, supports a reasonable inference of retaliation (*Kwan*, 737 F3d at 845 [three-week period between complaint and adverse action sufficient to establish temporal proximity]; *Gorzynski v Jet Blue Airways Corp.*, 596 F3d 93, 110 [2d Cir 2010] [five months is sufficient to find causal relationship]; *Matter of Cory Wright*, Docket No. PR 16-013, at pp. 19-20).

We find that it was reasonable for respondent to determine that Marcellus established a prima facie case of retaliation.

Petitioner failed to prove that it had a legitimate, nondiscriminatory reason for the adverse action.

Once a prima facie case of retaliation is established, the employer must produce evidence of a legitimate, nondiscriminatory reason for the adverse action (*Burdine*, 450 US at 255). The reason must be shown through the introduction of "admissible evidence" that frames the factual issue with sufficient clarity so that the employee will have "a full and fair opportunity to

demonstrate pretext” (*id.* at 255-256). If the employer establishes a legitimate, non-discriminatory reason for the adverse action, the burden then shifts back to the employee to demonstrate pretext, which he may do by submitting additional evidence or by relying on his initial evidence “combined with effective cross-examination” of the employer that will suffice to discredit the employer’s explanation (*id.* at 255 n 10).

Petitioner asserts that Marcellus was laid off due to a lack of funds however petitioner’s only support of this assertion was testimony from Dopp that was not corroborated with documentary evidence or other witness testimony. Dopp testified that he laid Marcellus off because of increased department expenses, including for mechanical breakdowns. Dopp undermined his own testimony by also testifying that he also laid Marcellus off because he was a “troubled employee” and that the incident that occurred between him and Marcellus on June 10, 2011 factored into his decision to lay off Marcellus. Petitioner did not offer any evidence of the highway department’s budget during the relevant period or evidence of unanticipated or excessive expenses that the highway department incurred requiring the lay-off of an employee.

Petitioner’s lack of evidence beyond Dopp’s self-serving testimony is insufficient to prove that the Town had a legitimate non-discriminatory reason to lay off Marcellus and the *prima facie* case of retaliation stands un rebutted. We do not need to reach the question of whether the Town’s explanation was pretextual.

Petitioner did not prove that respondent’s determination was unreasonable or invalid.

We find on the record evidence that petitioner did not meet its burden of proof to establish that the respondent’s determination that Marcellus was laid off in retaliation for his protected activity in violation of Labor Law § 27-a (10) was unreasonable or invalid. We also reject petitioner’s assertion that we should revoke respondent’s determination because respondent’s investigation was biased or incomplete. Hearings before the Board are *de novo* hearings and here each party has an opportunity to present any and all relevant evidence to Marcellus’s retaliation claim (*see e.g. Matter of Clifton J. Morello [T/A Iron Horse Beverage LLC]*, Docket No. PR 14-283, at p. 6 [September 14, 2016]). While respondent’s investigation may have been lacking in some detail, the evidence presented at hearing about the events that gave rise to Marcellus’s PESHRA complaint is the most probative evidence here. After review of all of the evidence in the record, we find that there was sufficient evidence to show that respondent’s determination was reasonable.

Respondent’s conduct constitutes spoliation but does not change the Board’s decision herein.

Petitioner requests that the Board take an adverse inference against respondent because of respondent’s purported spoliation of evidence due to respondent’s conduct. A party that is seeking sanctions for spoliation of evidence must prove (1) that the offending party had a duty to preserve the evidence; (2) that the documents were destroyed with a culpable state of mind, which can be established by a showing of ordinary evidence; and, (3) that the destroyed evidence was relevant to the asserting party’s claim or defense such that the trier of fact could find that the destroyed evidence would support the claim or defense (*VOOM HD Holdings, LLC v EchoStar Satellite LLC*, 93 AD3d 33, 45 [1st Dept 2012] citing *Zubulake v UBS Warburg LLC*, 220 FRD 212, 220 [SD NY 2003]). If the evidence that is destroyed was intentionally destroyed, the relevance of such evidence is presumed. If the evidence was negligently destroyed, the party seeking sanctions must

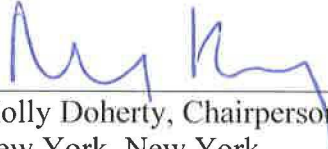


establish the relevance of the destroyed documents (*Pension Comm. of the Univ. of Montreal Pension Plan v Banc. of Am. Sec., LLC*, 685 F Supp 2d 456, 467-468 [SD NY]).

Respondent represented during the hearing that it would provide earlier drafts of Cappelli's investigative report to petitioner and Cappelli testified that he maintained earlier drafts of the report in the investigative file. Despite such representations, petitioner asserted in its post-hearing brief that respondent's counsel purportedly told petitioner's counsel that the earlier drafts of the investigative report had been destroyed. There is no evidence in the record or in any subsequent filings with the Board that respondent ever produced these records.¹ Based on the record before the Board, we find that respondent's conduct constitutes gross negligence (*id.* at 464-465 and 467-468; *see also Ahroner v Israel Discount Bank of NY*, 2009 NY Misc LEXIS 6058, at *25-35 [Sup Ct NY Cty, July 13, 2009, No. 602192/03]). We take an adverse inference against respondent for the spoliation of evidence that Cappelli reached a conclusion prior to conducting a full investigation and taking into account all of the evidence that was part of the investigation. Even with taking this adverse inference against respondent, we find that such evidence does not alter our decision. Cappelli's draft report of his investigation and the final report of his investigation are of no probative value here because the parties offered testimony from numerous relevant witnesses and the Board has no reason to believe that any of the information contained in a draft investigative report would change the factual record before the Board.

We affirm the respondent's determination.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Commissioner's determination is hereby affirmed; and,
2. The petition for review be, and it hereby is, denied;


Molly Doherty, Chairperson
New York, New York
Patricia Kakalec, Member
New York, New York
Michael A. Arcuri, Member
Utica, New York
Najah Farley, Member
New York, New York
Gloribelle J. Perez, Member
New York, New York

Dated and signed by the Members
of the Industrial Board of Appeals
on January 29, 2020.

¹ Respondent's counsel was also directed by the Hearing Officer to submit documents that had been identified as Exhibits B, E and F to petitioner's counsel and to the Board in a phone call and a letter dated February 20, 2018 but the Board never received those exhibits. Those documents are not necessary to the decision herein.

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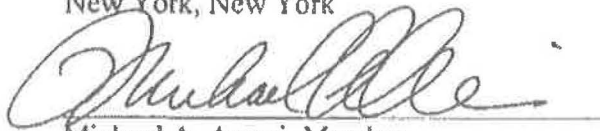
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2. The petition for review be, and it hereby is, denied;

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